1993

Lunnen v. Transportation : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS 930737 CA

JAMES M. LUNNEN, Petitioner, vs. UTAH DEPARTMENT OF TRANSPORTATION, and the CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH, Respondents.	Case No. 93-0737 CA 5 CSRB 46 (Step 6) 11 CSRB/H.O. 154 (Step 5) Priority 14.

REPLY BRIEF OF PETITIONER LUNNEN

APPEAL FROM THE DECISION AND ORDER OF THE CAREER SERVICE REVIEW BOARD, AN ADMINISTRATIVE AGENCY OF THE STATE OF UTAH, CASE NUMBER 11 CSRB/H.O. 154 (Step 5), 5 CSRB 46 (Step 6).

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IN THE UTAH COURT OF APPEALS

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I.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

All applicable statutes and rules were cited to the Court in

Petitioner's Appellant Brief, except the following, which are set forth verbatim in the Addendum hereto:

a. U.C.A. 58-17-9 (1953, as amended)

b. R477-2-3(2)

II.

ARGUMENT

I.

THIS COURT HAS NEVER INTERPRETED THE BURDEN OF PROOF LANGUAGE CONTAINED IN U.C.A. 67-19a-406(2)(a) AND THE ISSUE BEFORE THE COURT IS ONE OF FIRST IMPRESSION.

In Point I of its Reply Brief, the Utah Department of Transportation (herein UDOT) asserts that this Court's prior decisions in Utah Department of Corrections v. DeSpain, 824 P.2d 439 (Utah App. 1991), Kent v. Dept. of Employment Security, 860 P.2d 984 (Utah App. 1993), and Pickett v. Utah Department of Commerce, 858 P.2d 187 (Utah App. 1993) are controlling on the issue of which party has the burden of proving a disciplinary sanction complies with due process. Lunnen maintains this Court has never addressed the burden of proof language set forth in U.C.A. 67-19a-406(2)(a), and the cases cited by UDOT are inapplicable and distinguishable in any event. Lunnen therefore asserts that this Court should impose the burden of proof, as mandated by the statute, on the Agency and require them to comply

with due process. An examination of UDOT's argument is, however, in order.

A. THIS COURT'S DECISIONS IN DeSPAIN AND KENT ARE INAPPLICABLE.

UDOT cites DeSpain, supra., and Kent, supra., for the proposition that a State Agency must only prove that a disciplinary sanction is reasonable and rational and UDOT therefore has no obligation to prove anything more than misconduct. While Lunnen does not maintain that UDOT has misquoted or miscited either the DeSpain or Kent decisions, Lunnen respectfully submits that neither DeSpain nor Kent address the issue before the Court. An examination of both the DeSpain decision and the Kent decision is therefore in order.

In DeSpain, supra., the employee was working for the Utah Department of Corrections in a peace officer capacity. Mr. DeSpain engaged in a domestic assault upon his wife while off-duty, as well as being arrested for driving while under the influence. As a result of those criminal acts, and other allegations of misconduct, Mr. DeSpain was terminated from his employment. He appealed to the Career Service Review Board (herein CSRB), which reinstated Mr. DeSpain and imposed an alternative discipline. On appeal, this Court reversed and asserted that the CSRB's authority was limited by its own rules to determine whether or not an abuse of discretion had occurred.

At no time did this Court, in Despain, assess or analyze the statutory burden of proof language set forth in U.C.A. 67-19a-406(2)(a) (1953, as amended).

Likewise, in the Kent decision, supra., the employee was terminated from his employment as a result of a misdemeanor conviction for embezzlement. The employee was employed by the Department of Employment Security in a fiduciary capacity that required the handling of monies. In Kent, this Court acknowledged that State personnel rules impose a limitation on the actions of State agencies but held that the Department of Employment Security had fully complied with State personnel rules. Again, this Court did not address the burden of proof regarding disciplinary sanctions under U.C.A. 67-19a-406(2)(a) (1953, as amended).

Thus, a cursory examination of both the DeSpain and the Kent decisions reveals that this Court has never addressed the statutory burden of proof language found in U.C.A. 67-19a-406(2)(a) (1953, as amended). Furthermore, both the DeSpain and Kent decisions are factually distinguishable since they were cases involving termination from employment. This Court has never addressed a case in which an employee was demoted in the course of employment and the misconduct involved herein, by definition, is not as egregious as the misconduct set forth in

either DeSpain or Kent. In fact, Lunnen's misconduct is in the form of one (1) act of insubordination, to-wit: Lunnen did not go to work after receiving a phone call from a dispatcher to respond. While Lunnen acknowledges that his insubordination is grounds for discipline, his conduct does not rise to the level of the criminal misconduct that occurred in both DeSpain and Kent.

Since neither Despain nor Kent addressed the statutory burden of proof language and are factually distinguishable from the case at bar, Lunnen respectfully submits they are not controlling on the issues before this Court.

B. UDOT HAS THE OBLIGATION TO COMPLY WITH STATE PERSONNEL RULES BY USING DUE PROCESS AND EMPLOYING DISCIPLINE IN A CONSISTENT FASHION.

UDOT, in its Brief, asserts that it has no obligation to prove that it complied with State personnel rules regarding the severity of disciplinary sanctions imposed upon Lunnen. UDOT's argument ignores, however, the clear language of the Utah Administrative Procedures Act, which requires reversal of UDOT's action if it is contrary to an Agency rule. See, U.C.A. 63-46b-16(4)(h)(ii) (1953, as amended), accord, Kent, supra., at 986. In the case at bar, the Agency rule contemplated by the Utah Administrative Procedures Act are State personnel rules. Moreover, State personnel rules specifically require agencies to comply with State personnel rules, to-wit:

> "Agency personnel records, practices, policies and procedures shall be in compliance with DHRM rules and are subject to fact finding audit by the DHRM." R477-2-3(2). (Emphasis supplied).

Further, the foregoing compliance language must be read in connection with the disciplinary requirements set forth in R477-11-1-1, which mandates that principles of due process apply concerning disciplinary sanctions:

> "The type and severity of any disciplinary action taken shall be governed by principles of due process which include:
>
> (1)(a) Consistent application
> (1)(b) Prior knowledge of rules and standards
> (1)(c) Determination of fact
> (1)(d) Timely notice of noncompliance
> (1)(e) Opportunity to respond and rebut as defined herein." R477-11-1(1).

A fair reading of the foregoing State personnel rules results in one (1) conclusion, to-wit: UDOT has the obligation to impose discipline upon its career service employees in a consistent fashion. Moreover, when deciding which party should carry the initial burden of proof in proving consistent application, Lunnen respectfully submits that UDOT is in an exclusive position to comply with due process (by carrying the burden of providing consistent application) whereas Lunnen is prohibited, under State law, from carrying that burden.

Specifically, State agencies maintain personnel files on all

state employees, (see U.C.A. 67-18-1, et seq. (1953, as amended)), and can readily access information to prove that it acted consistently and fairly in any given case. In contrast, the Government Records Access and Management Act, U.C.A. 63-2-101, et seq. (1953, as amended), specifically prohibits employees from obtaining records of other employees who have been disciplined:

> "63-2-304 Protected records.
>
> The following records are protected if properly classified by a governmental entity: ...
>
> (8) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:
>
> (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;
>
> (b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings; ..." U.C.A. 63-2-304(8) (1953, as amended).

UDOT can thus easily prove that it has complied with the due process requirements set forth in State personnel rules whereas Lunnen is effectively precluded by the Government Records Access and Management Act from carrying the burden of proof if this Court so requires. Thus, UDOT is asking this Court to impose a

burden upon all career service employees of proving that a State agency has acted inconsistently, without the opportunity to obtain the evidence to carry that burden. Such an approach is fundamentally unfair and suggests that UDOT desires to use the sword of discipline while shielding its compliance with State personnel rules from examination by an administrative tribunal. This Court should not adopt such a fundamentally unfair position.

C. THE BURDEN OF PROOF LANGUAGE SET FORTH IN U.C.A. 67-19a-406(2)(a) PREDATES THE UTAH ADMINISTRATIVE PROCEDURES ACT AND THE PICKETT DECISION IS THEREFORE NOT CONTROLLING.

This Court's recent decision in Pickett, supra., relies upon the provisions of U.C.A. 63-46b-16(4)(h)(iii) (1953, as amended), for the proposition that a person challenging an agency action must carry the burden of showing that an agency has acted in an inconsistent fashion with prior practices. The Pickett decision is, however, inapplicable to the case at bar for several reasons.

First, Pickett involved a license revocation proceeding that involving a pharmacist. Those license revocation proceedings are matters of public record. In contrast, disciplinary actions involving public employees are not public records and, in fact, are protected records under the Government Records Access Management Act. See, U.C.A. 63-2-304(8) (1953, as amended).

Secondly, the Utah Administrative Procedures Act was adopted in 1988. The burden of proof language that is contained in

U.C.A. 67-19a-406(2)(a) (1953, as amended), predates the adoption of the Utah Administrative Procedures Act inasmuch as the burden of proof has been on State agencies in disciplinary cases since 1981. In 1981, the Legislature passed Senate Bill 271, which affirmatively required State agencies to carry the burden of proof in all disciplinary cases before what was then known as the Personnel Review Board (now known as the Career Service Review Board). The language in Senate Bill 271 has been substantially carried forward under the current version set forth in U.C.A. 67-19a-406(2)(a) (1953, as amended). A copy of Senate Bill 271 is set forth in the Addendum hereto. Lunnen therefore submits that the burden of proof language set forth in U.C.A. 67-19a-406(2)(a) (1953, as amended) was not intended to be superseded by the adoption of the Utah Administrative Procedures Act in 1988. Pickett is therefore not persuasive authority for interpretation of the statutory burden of proof language in employee disciplinary cases.

Furthermore, the proceedings in Pickett were exclusively governed by the Utah Administrative Procedures Act because the Pharmacy Practice Act does not set forth any procedures for discipline other than the fact that a hearing will be conducted under the Utah Administrative Procedures Act. See, U.C.A. 58-17-9 (1953, as amended). Moreover, the Utah Administrative

Procedures Act does not contain any allocation of burdens at the administrative level but does so at the judicial level. See, U.C.A. 63-46b-16(4) (1953, as amended). In contrast, discipline of career service employees is governed by a specific statutory process, as contained in the Grievance and Appeal Procedures set forth in U.C.A. 67-19a-101, et seq., (1953, as amended), and allocates the burden of proof to the Agency in disciplinary cases in administrative hearings. The Pickett analysis thus does not assist this Court in interpreting the burden of proof language contained in U.C.A. 67-19a-406(2)(a).

In summary, the Pickett decision is not helpful nor persuasive in interpreting the statutory language set forth in U.C.A. 67-19a-406(2)(a) (1953, as amended). This Court must interpret that burden of proof language to require State agencies to comply with the due process mandate of imposing consistent discipline, as mandated by State personnel rules. Failure to comply with that due process requires reversal of the Career Service Review Board's decision to uphold the discipline of Lunnen in this matter.

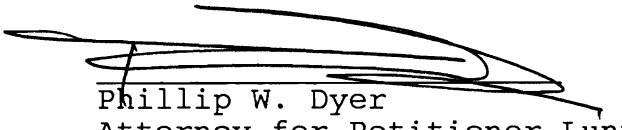
CONCLUSION

UDOT never complied with the due process requirement of demonstrating that it imposed a disciplinary sanction upon Lunnen that was consistent with other disciplinary actions. UDOT's

failure to carry its burden is fatal to its case and warrants reversal for the reasons set forth herein, as well as for the reasons set forth in Lunnen's Brief on file with the Court.

Dated this 27th day of July, 1994.

Respectfully submitted,



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k/mi/Lunnen.rep/APP1

ADDENDUM

A. U.C.A. 58-17-9 (1953, as amended)

B. R477-2-3(2)

C. Senate Bill 271

ADDENDUM A

U.C.A. 58-17-9 (1953, as amended)

U.C.A. 58-17-9 Grounds for denial of license -- Disciplinary proceedings.

(1) Grounds for refusal to issue a license to an applicant, for refusal to new the license of a licensee, to revoke, suspend, restrict, or place on probation the license of a licensee, to issue a public or private reprimand to a licensee, and to issue cease and desist orders shall be in accordance with Section 58-1-401.

(2) In addition, after a hearing conducted pursuant to Title 63, Chapter 46b, Administrative Procedures Act, the division may impose additional administrative penalties upon a drug outlet of up to $2,000 for each day in which the violation occurred and an assessment of costs associated with the investigation, hearing, and all litigation required to finally resolve the finding if it is determined that a drug outlet:

(a) engaged in the practice of pharmacy in this state without a license under this chapter;

(b) permitted any person to engage in the practice of pharmacy in this state in violation of this chapter; or

(c) conducted any out-of-state mail service pharmacy without a license under this chapter by having:

(i) shipped, mailed, or delivered by any means a dispensed legend drug to a resident in Utah;

(ii) provided information to a resident of this state on drugs or devices which may include advice relating to therapeutic values, potential hazards, and uses; or

(iii) counseled pharmacy patients residing in this state concerning adverse and therapeutic effects of drugs.

ADDENDUM B

R477-2-3(2)

R477-2-3(2) Compliance Responsibility

Agency personnel records, practices, policies and procedures shall be in compliance with DHRM rules and are subject to fact finding audit by the DHRM.

ADDENDUM C

SENATE BILL 271

CHAPTER 268

S. B. No. 271 (Passed March 12, 1981. In effect May 12, 1981.)

STATE PERSONNEL MANAGEMENT ACT AMENDMENTS

AN ACT RELATING TO PERSONNEL MANAGEMENT; PROVIDING FOR A QUORUM OF THE PERSONNEL REVIEW BOARD; PROVIDING FOR THE BURDEN OF PROOF IN HEARINGS BEFORE A HEARINGS OFFICER; PROVIDING FOR THE TAKING OF A WRITTEN TRANSCRIPT OF PROCEEDINGS CONDUCTED BEFORE A HEARINGS OFFICER; AND PROVIDING FOR THE RIGHT OF APPEAL BY A STATE AGENCY TO THE PERSONNEL REVIEW BOARD.

THIS ACT AMENDS SECTION 67-19-12, UTAH CODE ANNOTATED 1953, AS ENACTED BY CHAPTER 139, LAWS OF UTAH 1979, AND SECTIONS 67-19-20 AND 67-19-25, UTAH CODE ANNOTATED 1953, AS LAST AMENDED BY CHAPTER 81, LAWS OF UTAH 1980.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section amended.

Section 67-19-12, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1979, is amended to read:

67-19-12. Classification and pay plans—Director to develop and maintain—Criteria for classification—Periodic studies and desk audits—Pay regulations—Salary increases—Cost of living adjustments—Periodic revisions based on salary surveys—Separate pay plan for trade and craft positions—Evaluation of total compensation program—Proposal for total compensation plan—Governor's budget proposals.

(1) The director of personnel management shall be responsible for the preparation, maintenance, and revision of a position classification plan for all positions in state government except members of the legislature and legislative employees, members of the judiciary and judicial employees[~~, executive positions covered by the plan established by the executive compensation commission,~~] ; elected members of the executive branch and their exempt employees, certificated employees of the state board of education, officers, faculty and other employees of state institutions of higher education[~~,~~] ; and any positions for which the salary is set by law. Classification of positions shall be based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay may be applied equitably to, all positions in the same class. The director shall allocate or reallocate the position of every employee in the classified service to one of the classes in the plan. The office of personnel management shall conduct periodic studies and desk audits at least once every three years, insofar as possible, to ensure that the classification plan is kept reasonably current and reflects the duties and responsibilities actually being assigned to and performed by employees.

(2) With the approval of the governor, the director shall develop and promulgate a pay plan for all positions in the classified service. The pay plan shall be designed to achieve, to the degree that funds will permit, equal pay for equal work and comparability of state salaries to wages and salaries paid by private enterprise and other public employment for similar work. The following provisions shall be followed in development of the classified pay plan:

(a) The pay plan shall consist of sufficient grades to permit adequate salary differential among the various levels of classes of positions in the classification plan. Each salary grade shall contain within-grade salary step increases to allow for salary advancements based upon quality and length of service and for other salary adjustments. The percentage differential between steps shall be equal.

(b) Each class of positions in the classification plan shall be assigned to a salary grade and the director shall determine the number of steps in that grade to be used for such class of positions. The number of steps assigned to a class shall be set to reflect the normal growth and productivity potential of employees in that class and shall constitute the maximum number of steps through which the employee may be allowed to advance while in that grade. The number of steps used need not be uniform for all classes of positions in the plan.

(c) The director shall issue regulations for the administration of the pay plan. Pay regulations for in-grade salary increases shall specify a waiting period of at least six months between steps 1 and 2, and may specify longer waiting periods between remaining steps, but the waiting periods between steps shall be the same for all grades. Where salary ranges of less than the total number of steps in a grade are used, as provided in subsection (2)(b) of this section, the waiting periods shall apply to the number of steps used as indicated. The pay regulations may make provision for superior performance increases and for a program of incentive awards for cost saving suggestions and other worthy acts of state employees. The director shall issue regulations governing salary adjustments due to promotions.

(d) Salary step increases granted to employees shall not be automatic but shall be based on performance ratings indicating a satisfactory increase in employee productivity and performance.

(e) The director, prior to October 31 of each odd-numbered year, shall recommend to the governor adjustments to the pay plan to reflect changes in the [~~cost of living. The recommendations shall be based on the consumer price index, U. S. city average, as published by the United States Department of Labor as of October 1st of the preceding year and shall only take place when that index has varied from the previous year by at least 2%~~] average wage in the Utah labor market.

(f) The director shall periodically recommend revisions in the classified pay plan to achieve comparable rates to those paid by private enterprise except where there are no comparable private positions in Utah for similar work. A salary survey which shall include total compensation including fringe benefits shall be completed during September of each even-numbered year. The survey shall be conducted using valid statistical techniques and shall be constructed in a way to permit comparisons with prior surveys. The survey shall be of a cross section of the various types of employers throughout the state and the results shall be weighted to remove any bias caused by uneven responses. Survey weighting shall be proportional to the employer mix in the state as measured by the number of employees in each firm and shall be proportioned to the government-nongovernment mix in the state as measured by the number of state and local government employees and nongovernment employees. The survey shall consider the maximum number of jobs possible including only jobs which exist in government and those with more than 15

employer responses, or covering more than 150 employees. Survey responses on jobs not meeting these minimums may be used for individual job comparisons but may not be used as benchmark jobs in determining the overall wage comparison. Fringe benefit data in the survey and provided in state government shall be reduced to cost-to-employer figures, then weighted and compared using the procedures described herein for salaries. The director may cooperate with other public jurisdictions in conducting the salary survey. The results of this survey shall be forwarded, together with recommended revisions to the pay plan, to the governor prior to October 30 of the year in which the survey is completed. The recommended revisions shall include consideration of those selective adjustments necessary to achieve reasonable comparability of classes or positions with like positions or occupational areas in private industry except where there are no comparable private positions in Utah to the degree that funds will permit.

(g) The governor shall *include the* [~~cost-of-living~~] labor market change adjustments in preparation of the executive budget and shall recommend the method of distribution of adjustments determined according to this section. The governor shall also consider the recommended revisions due to the salary survey and to provisions for superior performance increases and incentive awards in preparing the budget. Recommendations made by the governor to the legislature for funding of any revisions to the pay plan and selective salary adjustments shall be accompanied by schedules indicating cost by individual departments and recommended source of funds.

(h) [~~Adjustments to the pay plan enacted by the legislature~~] The pay plan and any adjustments shall be approved by the legislature in the state general appropriations act and shall take [~~place~~] effect on July 1 following their enactment.

(i) A separate pay plan for trade and craft positions shall be developed and maintained by the director and shall be determined by taking the average rate found in private industry within the community without special regard to union scales. The director shall develop and issue criteria and standards for determining which trade, craft, and related positions shall be placed in the plan. The plan shall consist of similar occupations in private industry. The pay plan, however, shall be adjusted to reflect normal and reasonable differences in working conditions and tenure between state employment and private industry. The same provisions that apply to the classified pay plan regarding [~~cost-of-living~~] labor market change adjustments and salary surveys shall apply to the trade and craft plan. The provisions of subsection (2)(c) of this section regarding waiting periods for in-grade salary increases shall not apply to this plan. The director shall establish standards and requirements regarding step and grade increases that will establish a reasonable progression through the steps of apprentice, journeyman and master.

(3) The director shall regularly evaluate the total compensation program of state employees in the classified service. Total compensation shall include but not be limited to salaries and wages, bonuses, paid leave, job security, group insurance plans, retirement and all other fringe benefits that are or may be offered to state employees as inducements to work for the state.

(4) The director shall submit proposals for a total compensation plan to the governor by October 30 of each year, setting forth findings and recommendations affecting state employee compensation which the governor shall

consider in the preparation of budget recommendations to the legislature. The governor's budget proposals shall include a specific recommendation on state employee compensation to be acted upon by the legislature.

Section 2. Section amended.

Section 67-19-20, Utah Code Annotated 1953, as last amended by Chapter 81, Laws of Utah 1980, is amended to read:

67-19-20. Personnel review board created—Members— Appointment—Terms —Organization—Removal—Compensation—Powers and duties—Hearing officers—Executive secretary—Antidiscrimination investigation.

(1) There shall be a personnel review board of five members, appointed by the governor for four-year terms, three with terms coterminous with the governor's and two with terms beginning January 1 of the third year of the governor's regular term in office. The members of the existing five member merit system council shall complete the terms for which they are appointed and subsequent appointments shall be made in a manner to be determined by the governor to effect the rotation required by this subsection.

(2) The personnel review board shall be organized as follows:

(a) The members of the board shall be persons in sympathy with the application of merit principles to public employment. No member of the board shall be a member of any local, state or national committee of a political party or an officer or member of a committee in any partisan political club, or shall hold, or be a candidate for, any paid public office. No more than three members of the board shall be from the same political party;

(b) The governor shall annually designate one of the board members to serve as chairman, and any three board members may constitute a quorum for the performance of all duties and responsibilities hereinafter set forth and the actions of a majority of those present at a hearing at which a quorum is present shall be the actions of the board;

(3) The board members may be removed only for cause; and

(4) ~~Each board member shall receive an amount to be determined by the~~ board of examiners for official meetings attended and reimbursement for official travel expenses.

(5) The duties and responsibilities of the personnel review board shall be:

(a) To serve as a quasi-judicial body to hear appeals from employees regarding actions taken under authority granted by this chapter to the director or to agencies including matters pertaining to classification, examinations and registers, violations of personnel rules, disciplinary actions and reductions in force;

(b) To serve as the final administrative appeal body to hear grievances brought by career service employees against agencies which have not been resolved at an earlier stage in the appeals process; and

(c) To serve as the hearing body for grievances, brought under the grievance procedure of this chapter by any employee of the state other than an employee of an institution of higher education alleging discriminatory or unfair employment practices as prohibited by section 34-35-6

(6) The personnel review board shall appoint one or more impartial hearing officers on a full-time or part-time basis, who shall have demonstrated by education and experience an ability to arbitrate and resolve personnel administration disputes and to handle employee relations in a large work force

(7) The personnel review board shall employ an executive secretary who shall have demonstrated an ability to administer personnel policies and may appoint clerical assistance as needed The executive secretary shall have the power to subpoena witnesses, documents, or other evidence in conjunction with any inquiry, investigation, hearing, or other proceeding Employees of the personnel review board shall be exempt from the career service provisions of this chapter

(8) The personnel review board, upon receipt of an appeal submitted to it involving alleged discrimination as prohibited by section 34-35-6, may request the Utah antidiscrimination division to conduct an investigation of the alleged discriminatory practices and report its findings to the board at a time agreed upon by the board and the division

(9) Any member of the personnel review board may administer oaths, certify official acts, and subpoena witnesses, documents, or other evidence in conjunction with any inquiry, investigation, hearing, or other proceeding

Section 3. Section amended.

Section 67-19-25, Utah Code Annotated 1953, as last amended by Chapter 81, Laws of Utah 1980, is amended to read

67-19-25. Grievance and appeals procedure—Procedural steps to be followed by employee—Evidentiary and procedural rules—Decisions—Appeal to district court.

An aggrieved employee appealing an administrative action shall observe the following procedural steps

(1) An aggrieved employee shall first attempt to resolve a grievance through discussion with the employee's immediate supervisor

(2) If the grievance submitted under subsection (1) remains unanswered for five working days after submission, or if the aggrieved employee is dissatisfied with the decisions reached, the appeal may be resubmitted in writing to the employee's immediate supervisor within five working days after the expiration of the period for answer or receipt of the decision, whichever is first The immediate supervisor shall render a written decision under this step within five working days after submission of the appeal

The employee shall, upon submission of the appeal to the immediate supervisor, notify the executive secretary of the personnel review board that the employee has initiated the appeal The executive secretary shall upon receipt of the notification of the appeal attempt to settle the complaint by

conference, conciliation and persuasion. If the executive secretary believes that the grievance is one that the agency does not have the authority to resolve, he may, with the concurrence of the employee and the agency, waive the requirement for a decision by the immediate supervisor and subsections (3) and (4) of the grievance procedure and submit the grievance directly to the hearing officer under subsection (5). He also shall attempt to resolve the dispute by informal means with the director.

(3) If the appeal submitted under subsection (2) remains unanswered for five working days after submission, or if the aggrieved employee is dissatisifed with the decision reached, the appeal may be submitted in writing to the employee's second level supervisor within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first. A written decision under this step setting forth the reasons for decision shall be rendered within five working days after submission of the appeal.

(4) If the appeal submitted under subsection (3) remains unanswered for five working days after submission, or if the aggrieved employee is dissatisifed with the decision reached, the appeal may be submitted in writing to the employee's department head within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first. A written decision under this step setting forth the reasons for the decision shall be rendered within ten working days after submission of the appeal.

(5) If the appeal submitted under subsection (4) remains unanswered for ten working days after submission, or if the aggrieved employee is dissatisfied with the decision reached, the appeal may be submitted in writing to the hearing officer within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first. Written notice of the time and place for hearing shall be given to the aggrieved employee at least five days before the date set for hearing which shall be set not later than 15 days after submission of the grievance or at a time agreed upon by the aggrieved employee and the hearing officer.

Informal rules of evidence and procedure are applicable at such hearings. The aggrieved employee and employer may, in addition to the provisions of section 67-19-22, be present at all hearings, produce witnesses, examine and cross examine witnesses, and examine documentary evidence. A [~~tape recording of~~] certified court reporter shall report the proceedings. [~~shall be made and the~~] The transcript of the proceedings, together with all exhibits received during the hearing, shall constitute the record of the hearing. The hearing officer may subpoena witnesses and compel testimony in the conduct of said hearings. The state shall bear the burden of proof in all appeals resulting from dismissals, demotions, suspensions and other disciplinary actions. The employee shall bear the burden of proof in all other appeals.

The hearing officer shall render a written decision supported by findings of fact and conclusions of law within 15 working days after the hearing.

(6) If no decision is rendered under subsection (5) within 15 working days after the hearing, or if either the aggrieved employee or the agency is dissatisfied with a decision on appeal from dismissal or if the aggrieved employee, [~~or~~] applicant or agency alleges that a decision of the hearing officer was based on incorrect or arbitrary interpretation of facts or that a matter of law is in dispute, [~~the~~] an appeal may be submitted in writing, together

with a transcript of the hearing conducted under subsection (5), to the personnel review board within ten working days after the expiration of the period of decision or upon receipt of the decision, whichever is first. Written notice of the time and place for hearing by the board shall be given to the [~~aggrieved employee or applicant~~] employee and the agency at least five days before the date set for the hearing which shall be held not later than 30 days after submission of the appeal, except that in the case of an appeal in which the aggrieved employee alleges discrimination the board may set a date for the hearing later than 15 days after submission of the appeal. [~~In a hearing before the personnel review board on an appeal from a dismissal or demotion based upon inefficiency where the charge is supported by credible evidence, there shall be a rebuttable presumption in favor of the employer, except that if the employer has failed to comply with the provisions of section 67-19-18, the burden of proof and persuasion shall be upon the employer.~~] The hearing *before the personnel review* board shall be based upon the record as established under subsection (5). Hearings of *the board shall be recorded and the* complete transcript of a hearing, together with all exhibits and written briefs submitted, shall constitute the record of the hearing.

The personnel review board shall render a written decision within 15 working days after the hearing. The decision of the board is binding upon the [~~aggrieved employee and upon the~~] agency [~~whose action caused the appeal~~]. The board may, at its discretion, order that an employee be placed on the reappointment roster provided for in section 67-19-17 for assignment to another agency. The aggrieved employee [~~or the agency~~] may appeal the decision of the personnel review board to the district court of the district in which the position is located or to the district court of Salt Lake County. On appeal to the district court, the board's findings of fact, if supported by substantial evidence, shall be conclusive.

(7) An applicant for a position in Utah state government who alleges discriminatory or unfair employment practices in hiring as defined in section 34-35-6, may submit a complaint in writing to the executive secretary who shall attempt to settle the complaint by conference, conciliation and persuasion. If the applicant remains dissatisfied with the decision reached after ten working days following the submission of the complaint, the applicant may submit the complaint in writing to the hearing officer under subsection (5) and shall thereafter be entitled to the rights of appeal as provided in subsections (5) and (6).

Approved March 30, 1981.

CERTIFICATE OF HAND DELIVERY

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

Phillip W. Dyer, being duly sworn, deposes and says:

That he served **REPLY BRIEF OF PETITIONER LUNNEN** upon the following parties by hand-delivering two (2) true and correct copies each thereof in an envelope addressed to:

STEPHEN G. SCHWENDIMAN, ESQ.
Counsel for Agency
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114

Robert N. White
Administrator
Career Service Review Board
1120 State Office Building
Salt Lake City, Utah 84114

this 27th day of ~~August~~ July, 1994.

SUBSCRIBED AND SWORN to before me this 27th day of ~~August~~ July, 1994.

Notary Public
Residing at:
Salt Lake County, Utah

My Commission expires:
12-23-95

Notary Public
KATHLEEN J. GILLMAN
318 Kearns Building
Salt Lake City, Utah 84101
My Commission Expires
December 23, 1995
State of Utah